FINAL AWARD ALLOWING COMPENSATION
(Affirming Award and Decision of Administrative Law Judge)

Injury No.: 05-036477

Employee: Shelby Mays

Employer: Arvinmeritor OE LLC (Settled)

Insurer: Self-Insured (Settled)

Additional Party: Treasurer of Missouri as Custodian of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated February 10, 2010. The award and decision of Administrative Law Judge Carl Strange, issued February 10, 2010, is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 3rd day of September 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

AWARD

Employee: Shelby Mays Injury No. 05-036477

Dependents: N/A

Employer: Arvinmeritor OE LLC

Additional Party: Second Injury Fund

Insurer: Self-Insured

Hearing Date: November 18, 2009 Checked by: CS/rf

SUMMARY OF FINDINGS

1. Are any benefits awarded herein? Yes

2. Was the injury or occupational disease compensable under Chapter 287? Yes

3. Was there an accident or incident of occupational disease under the Law? Yes

4. Date of accident or onset of occupational disease? March 3, 2005

5. State location where accident occurred or occupational disease contracted: New Madrid County, Missouri

6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes

7. Did employer receive proper notice? Yes

8. Did accident or occupational disease arise out of and in the course of the employment? Yes

9. Was claim for compensation filed within time required by law? Yes

10. Was employer insured by above insurer? Yes

11. Describe work employee was doing and how accident happened or occupational disease contracted: The employee was operating a "sizer" machine. As she was twisting and moving product into and out of the machine, she injured her back.

11. Did accident or occupational disease cause death? No

12. Parts of body injured by accident or occupational disease: Low Back

13. Nature and extent of any permanent disability: See Findings

14. Compensation paid to date for temporary total disability: $42,215.12

15. Value of necessary medical aid paid to date by employer-insurer: $239,070.20

16. Value of necessary medical aid not furnished by employer-insurer: N/A

17. Employee's average weekly wage: $688.29

18. Weekly compensation rate:

    $458.86 for temporary total disability
    $354.05 for permanent partial disability

19. Method wages computation: By Agreement

20. Amount of compensation payable:

    a. Employee's claim against the employer-insurer previously settled by compromise settlement agreement.
    b. Employee awarded permanent total disability benefits from the Second Injury Fund. (See Findings)

21. Second Injury Fund liability: Yes

22. Future requirements awarded: N/A

Said payments shall be payable as provided in the findings of fact and rulings of law, and shall be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Kim Heckemeyer.

FINDINGS OF FACT AND RULINGS OF LAW

On November 18, 2009, the employee, Shelby Mays, appeared in person and by her attorney, Kim Heckemeyer, for a hearing for a final award. The Second Injury Fund was represented at the hearing by their attorney, Assistant Attorney General Cliff Verhines. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with the findings of fact and rulings of law, are set forth below as follows.

UNDISPUTED FACTS:

1. On or about March 3, 2005, Arvinmeritor OE LLC was operating under and subject to the provisions of the Missouri Workers' Compensation Act and was a self-insured employer.
2. On or about March 3, 2005, the employee was an employee of Arvinmeritor OE LLC and was working under and subject to the provisions of the Missouri Workers' Compensation Act.
3. On or about March 3, 2005, the employee sustained an accident or occupational disease during the course of her employment.
4. The employer had notice of employee's accident.
5. The employee's claim was filed within the time allowed by law.
6. The employee's average weekly wage was $688.29, her rate for temporary total disability and permanent total disability is $458.86, and her rate for permanent partial disability is $354.05.
7. The employee's injury is medically causally related to the work injury on or about March 3, 2005.
8. The employer has furnished $239,070.20 in medical aid to employee.
9. The employer has paid temporary total disability benefits for 92 weeks at a rate of $458.86 per week for a total of $42,215.12.

ISSUES:

1. Nature and Extent of Disability
2. Liability of the Fund

EXHIBITS:

The following exhibits were offered and admitted into evidence:

Employee's Exhibits

A. Medical Records of
    1. Dr. August Ritter
    2. Physician Alliance Surgery Center
    3. Poplar Bluff Regional Medical Center
    4. Missouri Southern Healthcare

5. Advanced Pain Centers
6. Dr. Kee Park
7. St. Francis Medical Center
8. Dr. Cully Bryant

B. Deposition of Dr. Jerome Levy
C. Deposition of Susan Shea, Vocational Expert
D. Compromise Stipulation Agreement Injury #03-137870
E. Compromise Stipulation Agreement Injury #00-092641
F. Compromise Stipulation Agreement Injury #05-036477
G. Temporary Award Injury #05-036477

FINDINGS OF FACT:

Based on the testimony of Shelby Mays ("employee") and the medical records and reports admitted, I find as follows:

At the time of the hearing, the employee was 63 years old and has lived in Bloomfield, Missouri for several years. She went to school as far as the seventh grade, but had to quit at the age of thirteen in order to support herself. While in school, she took special education classes and her reading and grades were not very good. The employee later received her GED. Prior to working for the employer, the employee worked as a babysitter, housekeeper, clerk, waitress, cook, candy factory worker, and sewing machine operator. She began factory employment when she turned twenty years old. In 1988, she began employment with Arvinmeritor OE LLC ("employer"). When the employee first started, she worked in the muffler department as a spot welder, ran a turntable and packaged mufflers into containers. After some time, the employee transferred to the Y-Pipe department. There she ran machines and did whatever she was told to do. Over the years of employment with the employer, the employee worked in several capacities and departments including running machines, welding, office cleaning and office work.

On August 10, 1990, the employee saw Dr. August Ritter for a work injury to her left hand which included a partial amputation of the ulnar aspect of the distal phalanx of the long finger and had a nail bed avulsion and laceration nail bed, partial avulsion thumb. Following his treatment of the employee, Dr. Ritter rated the employee's impairment at twenty percent (20%) of the long finger and five percent (5%) of the thumb (Employee Exhibit A1, Pages 1-2).

The employee injured her right shoulder on July 28, 2000 while working for the employer. Following treatment with medication and physical therapy, Dr. Ritter diagnosed the employee with overuse rotator cuff tendonitis with adhesive capsulitis in her right shoulder. The employee underwent an MRI that did not show a tear but she continued to have problems with her right shoulder. On August 18, 2001, the employee underwent a right shoulder arthroscopy with subacromial decompression by Dr. Ritter. After noting that the employee should avoid repetitive overhead work, Dr. Ritter rated the employee at a seven percent (7%) permanent partial disability of her right upper extremity at the level of the shoulder (Employee Exhibit A1, Pages 3-10). The employee later settled her claim against the employer for twenty-five (25%)

permanent partial disability of her right upper extremity at the level of her shoulder (Employee Exhibit E).

Although the employee worked in an office setting for a long period following her right shoulder injury, she eventually returned to the plant floor where she was required to pull, push and lift pipes. On April 17, 2003, the employee's pain in her left shoulder finally increased to the point where she sought treatment for it. Following treatment with physical therapy and medicine, Dr. Ritter noted that the MRI dated June 24, 2003 showed a partial thickness tear, supraspinatus and bicep tendons on her left shoulder. Dr. Ritter performed a left shoulder arthoscopy with subacromial decompression on September 4, 2003. Shortly after the surgery, the employee began having left lateral elbow pain and Dr. Ritter diagnosed the employee with left elbow lateral epicondylitis. Despite the surgery and other treatment, the employee continued to have problems with both of her shoulders including bilateral upper shoulder pain that radiated to the left of her neck, bilateral hand numbness at night, and swelling in her hands and wrists. On January 19, 2004, Dr. Ritter opined that the employee's return to work should be with a long term restriction of no work above shoulder high and no prolonged reaching such as sweeping or raking. Following an FCE, Dr. Ritter noted on March 18, 2004 that the employee was unable to run a hyster and some other jobs, but opined that her present job as a sizer should be medically safe. Further, he opined that she should avoid repetitive above shoulder work on a long time basis and no lifting over 20 pounds. Dr. Ritter placed the employee at maximum medical improvement with regard to her bilateral shoulder tendonitis on August 26, 2004 and gave a rating of five percent (5%) permanent partial disability of each shoulder (Employee Exhibit A1, Pages 11-20)(Employee Exhibit A2). The employee later settled her claim against the employer for twenty-five (25%) permanent partial disability of her left upper extremity at the level of her shoulder. Following that settlement, the employee settled her claim against the second injury fund for (25%) permanent partial disability of each of her upper extremities with a fifteen percent (15%) load (Employee Exhibit D).

Despite her continued problems with her arms, the employee worked on the floor for the employer until March 3, 2005. At that time, the employee was operating a "sizer machine" and injured her back. The employee felt immediate pain in her back and down her lower extremities. The employee initially treated with Missouri Southern Healthcare. Following the MRI that indicated a bilateral lateral recess stenosis with a bulging annulus at L4-L5 and a moderate central disc protrusion at L5-S1, the employee underwent physical therapy from May 3, 2005 to June 30, 2005 (Employee Exhibit A4). The employee also began pain management on June 14, 2005 with Advanced Pain Centers. A post discogram CT was completed on December 13, 2005 and indicated a radial tear at L5-S1, disc filling an 8 mm central posterior protrusion, annular bulges of the L3-4 and L4-5 discs without a frank tear, and bilateral facet arthrosis at L3 through S1 levels (Employee Exhibit A3). The employee finally concluded her pain management and was referred to Dr. Kee Park for a surgery consult on March 9, 2006 (Employee Exhibit A5). Dr. Kee Park performed a L4-5 and L5-S1 bilateral laminotomy with microdiskectomies with microdissection, a L4-5 and L5-S1 placement of Tetris PEEK interbody spacers with two at the L4-5 level and three at the L5-S1 level, and a L4-5 and L5-S1 posterolateral intertransverse fusion and posterior segmental fixation using Vertebron PSS system (Employee Exhibits A6 & A7). The employee continued to receive treatment for her back including pain medication from Dr. Cully Bryant and was referred back to pain management (Employee Exhibit A8). The

employee later settled the primary claim in this matter against the employer for thirty-six (36%) permanent partial disability of the body as a whole relative to her low back (Employee Exhibit F).

On May 31, 2007, Dr. Jerome Levy evaluated the employee. After taking her extensive history regarding her primary injury to her back and her prior injuries, Dr. Levy opined that the employee suffered a fifty percent (50%) permanent partial disability of her body as a whole for the work related accident in this matter and had a pre-existing twenty-five percent (25%) permanent partial disability of each upper extremity at the level of the shoulder. Further, he opined that the combination of the impairments created a greater disability than the simple total of each and a loading factor should be applied. Finally, he noted that as a result of all these disabilities, the employee was permanently and totally disabled and unable to compete in the open labor market. At his deposition on May 11, 2009, Dr. Levy testified that he had prior experience as a medical consultant for the Missouri Department of Vocational Rehabilitation for a number of years in the past, but was not a vocational consultant. Additionally, Dr. Levy reiterated that the employee was disabled as a result of a combination of the severe problem with her back and severe problems with both upper extremities (Employee Exhibit B).

The employee met with Susan Shea, a certified rehabilitation counselor, on March 26, 2008. After testing the employee and taking a detailed history, Ms. Shea opined that the employee is unemployable in the open labor market due to her pain, restrictions, limited education, problems with sitting and standing, and low skilled past work history. At her deposition on February 27, 2009, Ms. Shea noted that the employee had a failed attempt to return to work following her surgery even though she already had been approved for social security (Employee Exhibit C).

At the time of the hearing, the employee testified that she continued to have bilateral upper extremity complaints that caused her pain and problems when pushing a mop or vacuum, working in a nursery, taking food out of the oven, fixing her hair, and other activities. With regard to her low back, the employee has pain and problems sitting, standing, walking, bending, traveling in an automobile, and other activities. On cross-examination, the employee admitted that she would still be working if she had not injured her low back. At the time of the hearing, the employee testified that she was still taking Darvocet, Celebrex, pain patches, and Ultracet.

APPLICABLE LAW:

- Although the worker's compensation law must be liberally construed in favor of the employee, the burden is still on the claimant to prove all material elements of his claim. *Melvies v Morris*, 422 S.W.2d 335 (Mo. App.1968), and *Marcus v Steel Constructors, Inc.*, 434 S.W.2d 475 (Mo.App.1968). Therefore the employee has the burden of proving not only that he sustained an accident, which arose out of and in the course of his employment, but also that there is a medical causal relationship between his accident and the injuries and the medical treatment for which he is seeking compensation. *Griggs v A. B. Chance Company*, 503 S.W.2d 697 (Mo.App.1973).

- The test for finding the Second Injury Fund liable for permanent partial disability benefits is set forth in Section 287.220.1 RSMo as follows:

> "All cases of permanent disability where there has been previous disability shall be compensated as herein provided. Compensation shall be computed on the basis of the average earnings at the time of the last injury. If any employee who has a pre-existing permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining re-employment if the employee becomes unemployed, and the pre-existing permanent partial disability, if a body as a whole injury, equals a minimum of fifty weeks of compensation or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, according to the medical standards that are used in determining such compensation, receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree or percentage of disability, in an amount equal to a minimum of fifty weeks compensation, if a body as a whole injury or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, caused by the combined disabilities is substantially greater than that which would have resulted from the last injury, considered alone and of itself, and if the employee is entitled to receive compensation on the basis of the combined disabilities, the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no pre-existing disability. After the compensation liability of the employer for the last injury, considered alone, has been determined by an administrative law judge or the commission, the degree or percentage of employee's disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined by that administrative law judge or by the commission and the degree or percentage of disability which existed prior to the last injury plus the disability resulting from the last injury, if any, considered alone, shall be deducted from the combined disability, and compensation for the balance, if any, shall be paid out of a special fund known as the second injury fund, hereinafter provided for."

- The test for finding the Second Injury Fund liable for permanent total disability is set forth in Section 287.220.1 RSMo., as follows:

> If the previous disability or disabilities, whether from compensable injuries or otherwise, and the last injury together result in permanent total disability, the minimum standards under this subsection for a body as a whole injury or a major extremity shall not apply and the employer at the time of the last injury shall be liable only for the disability resulting from the last injury considered alone and of itself; except that if the compensation for which the employee at the time of the last injury is liable is less than compensation provided in this chapter for permanent total disability, then in addition to the compensation for which the employer is liable and after the completion of payment of the compensation by the employer, the employee shall be paid the remainder of the compensation that

> would be due for permanent total disability under Section 287.200 out of a special fund known as the "Second Injury Fund" hereby created exclusively for the purposes as in this section provided and for special weekly benefits in rehabilitation cases as provided in Section 287.414.

- Section 287.020.7 RSMo. provides as follows:

> The term "total disability" as used in this chapter shall mean the inability to return to any employment and not merely mean inability to return to the employment in which the employee was engaged at the time of the accident.

- The phrase "the inability to return to any employment" has been interpreted as the inability of the employee to perform the usual duties of the employment under consideration, in the manner that such duties are customarily performed by the average person engaged in such employment. *Kowalski v M-G Metals and Sales, Inc.*, 631 S.W.2d 919, 922(Mo.App.1992). The test for permanent total disability is whether, given the employee's situation and condition, he or she is competent to compete in the open labor market. *Reiner v Treasurer of the State of Missouri*, 837 S.W.2d 363, 367(Mo.App.1992). Total disability means the "inability to return to any reasonable or normal employment". *Brown v Treasurer of the State of Missouri*, 795 S.W.2d 479, 483(Mo.App.1990). An injured employee is not required, however, to be completely inactive or inert in order to be totally disabled. *Id.* The key is whether any employer in the usual course of business would be reasonably expected to hire the employee in that person's physical condition, reasonably expecting the employee to perform the work for which he or she is hired. *Reiner* at 365. See also *Thornton v Haas Bakery*, 858 S.W.2d 831,834(Mo.App.1993).

RULINGS OF LAW:

Issue 1. Nature and Extent of Disability & Issue 2. Liability of the Fund

The employee in this case has alleged that she is entitled to an award for permanent total disability from the Second Injury Fund. In the alternative, the employee has requested an award of permanent partial disability benefits from the Second Injury Fund. Both Dr. Levy and Ms. Susan Shea have agreed that the employee is permanently and totally disabled. At the time of the hearing, the employee admitted that she would still be working if she had not injured her back. As a result of the combination of her prior injuries to her bilateral upper extremities and the primary injury to her low back, the employee could no longer effectively perform her job. The employee's injury to her back was the final cause of her inability to work, but not the only cause.

The evidence in this case unequivocally supports a finding that the employee is permanently and totally disabled as a result of the combination of her pre-existing injuries to her bilateral upper extremities and the March 3, 2005 work related injury to her low back. A thorough review of the evidence indicates that the employee's pre-existing conditions never

improved to the point where she was able to perform her job duties without difficulty. Notwithstanding these significant pre-existing disabilities, the employee continued to work at a physically demanding job. These pre-existing disabilities did have an impact on her ability to perform her job. The evidence also supports a finding that the employee's primary injury to her low back caused a significant disability to the employee's bilateral upper extremities. Based on the evidence, I find that the employee suffered a thirty-six (36%) permanent partial disability of the body as a whole relative to her low back as a result of her March 3, 2005 work related accident.

In accordance with my above findings and the evidence, I find that the employee as of March 3, 2005, had a pre-existing disability equal to twenty-five (25%) of her left upper extremity at the level of her shoulder and twenty-five (25%) of her right upper extremity at the level of her shoulder. I further find that these pre-existing disabilities were a hindrance or obstacle to the employee's employment or re-employment. The evidence also supports a finding that the employee's pre-existing disabilities and her primary 05-036477 injury to her low back combined synergistically and caused the employee to be permanently and totally disabled.

Based on the evidence, I find that the employee reached her maximum level of medical improvement and the end of the healing period at the time that the employer finished paying temporary total benefits on December 8, 2006. The employer-insurer's permanent partial disability payments would therefore have commenced on December 9, 2006, and will continue for 141 and 2/7 weeks through August 23, 2009. Since the employee's permanent partial disability rate ($354.05) is less than the agreed rate of compensation for permanent total disability ($458.86), the Second Injury Fund is liable under Section 287.220.1 for the difference between the amount paid by the employer-insurer for permanent partial disability and the amount due for permanent total disability. The difference between the permanent total disability rate and the permanent partial disability rate is $104.81 per week. The Second Injury Fund is therefore directed to pay to the employee the sum of $104.81 per week for 141 and 2/7 weeks covering December 9, 2006, through August 23, 2009, for a total of $14,808.16. Since all of this additional compensation has accrued prior to the date of the hearing, the full amount of this payment shall be due and payable as of the date this award becomes final.

In addition to the difference between the permanent total disability rate and the permanent partial disability rate, the Second Injury Fund is also liable for the full amount of the permanent total disability benefits commencing August 24, 2009. The Second Injury Fund is therefore directed to pay to the employee the sum of $458.86 per week commencing on August 23, 2009, and said weekly benefits shall be payable during the continuance of such permanent total disability for the lifetime of the employee pursuant to Section 287.200.1, unless such payments are suspended during a time in which the employee is restored to her regular work or its equivalent as provided in Section 287.200.2.

ATTORNEY'S FEE:

Kim Heckemeyer, attorney at law, is allowed a fee of 25% of all sums awarded under the provisions of this award for necessary legal services rendered to the employee. The amount of this attorney's fee shall constitute a lien on the compensation awarded herein.

INTEREST:

Interest on all sums awarded hereunder shall be paid as provided by law.

Made by:

_____

Carl Strange
Administrative Law Judge
Division of Workers' Compensation

Date: _____

A true copy: Attest:

_____
Ms. Naomi Pearson